



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 717 of 2006

STEVE LUSENO..... PETITIONER/RESPONDENT

AND

KENYA AIRWAYS LIMITED..... RESPONDENT/APPLICANT

R U L I N G

A petition dated 16th November 2006 was filed by M/s Ahmednasir, Abdikadir & Company advocates for the petitioner **STEVE LUSENO**. The respondent is named as **KENYA AIRWAYS LIMITED**. The petition was purported to have been brought under Section 82 (2), (7) and 84 (6) of the Constitution, and Rules 11, 12, & 13 of the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual*) High Court Practice and Procedure Rules, 2006. It seeks for the following orders-

1. *A declaration that the denying Boarding of the Applicant on 20th June, 2005 on KQ641 in favour of Caucasian Passengers was a gross violation of his constitutional rights to protection against discrimination on grounds of race under Section 82 of the Constitution.*
2. *An award of aggravated damages for the pain, humiliation and distress visited upon the petitioner.*
3. *The respondent to pay the costs of these proceedings.*
4. *Such other orders as this Honourable Court shall deem fit.*

After filing a replying affidavit sworn on 11th December, 2006 by **JEREMIAH MACHARIA MUTERO** a Legal Counsel of the Respondent/applicant the said (*hereinafter referred to as applicant*) through M/S Ochieng, Onyango, Kibet & Ohaga advocates filed a Chamber Summons dated 23rd May, 2007 under Order 6 Rules 13(1) (a) (b) & (d) of the Civil Procedure Rules and inherent powers of the court. In the Chamber Summons, the prayers sought are-

1. *The petition herein be struck out and the suit against the respondent be dismissed.*
2. *The costs of this application and the petition be borne by the petitioner.*

This Chamber Summons is the application on which I am presently required to make a decision.

The said Chamber Summons has grounds on its face. The grounds of the Chamber Summons application are that-

- (a) *The petition discloses no reasonable cause of action against the respondent.*
- (b) *The petition is frivolous and vexatious.*
- (c) *The Petition is otherwise an abuse of the process of court.*
- (d) *The petitioner's claim, if any, lies in private law and not vindication of his Constitutional rights.*
- (e) *The protection of fundamental rights and freedoms is the preserve of the Government and not private individuals and the respondent cannot therefore be accountable to the petitioner under Chapter 5 of the Constitution.*
- (f) *The proper respondent in a claim arising from alleged breach of fundamental rights ought to be the Attorney-General.*

Both Counsel for the parties filed skeleton arguments regarding this Chamber Summons application, and also filed list of authorities. Mr. Bwire, who appeared at the hearing for the applicant, and Mr. Issaic who appeared for the respondent/petitioner made extensive submissions before me and cited several authorities.

In my view, this application is a preliminary application, and its decision has to be based on a clear legal basis that the petition is incompetent, or incurably defective. Many of the arguments put to me during submissions seem to go to the actual merits of the petition, which I am not able to determine at this stage, the petition having not been ventilated before me.

On the issue whether the Attorney-General should have been the party to be sued, my answer is that under the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006 there is no requirement that in all Constitutional cases, the Attorney-General must be made the respondent. Secondly, whether in any particular case a private person may or may not be liable for Constitutional breaches, will be an issue to be determined by the court at the hearing of the main motion. At this preliminary stage, and in a Constitutional matter, I will not strike out petition because of arguable technicalities. It is preferable to make decisions after all the parties ventilate their case for substantial justice to be done.

I may mention here that, in making the 2006 rules, the Chief Justice did not create new parties as alleged by Counsel for the applicant herein. There is no statutory law that has been cited to me, nor have I seen any statutory law that, states that Constitutional actions can only be brought against the Attorney-General. The case law positions are, in my view, part of the development in Constitutional jurisprudence, and they could in appropriate cases be varied depending on the circumstances of each case. The Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006, to my knowledge, do not contradict any written law, and have not been set aside by the court, therefore they are valid and effective.

The upshot of the above is that I dismiss the Chamber Summons dated 23rd May, 2007, as I find it to have no merits. The petition filed will be progressed and heard in the normal manner.

Costs will be in the cause.

It is so ordered.

Dated and delivered this 7th day of July, 2008.

GEORGE DULU

JUDGE.